

1 JENNIFER B. BONNEVILLE (State Bar No. 243686)

jbonneville@steptoe.com

2 STEPTOE & JOHNSON LLP

633 West Fifth Street, Suite 700

3 Los Angeles, California 90071

Tel: (213) 439-9405

4 Fax: (213) 439-9599

5 JOHN D. LOVI (pro hac admission pending)

jlovi@steptoe.com

6 LARA E. ROMANSIC (admitted pro hac vice)

lromansic@steptoe.com

7 MICHELLE L. LEVIN (admitted pro hac vice)

mlevin@steptoe.com

8 STEPTOE & JOHNSON LLP

1114 Avenue of the Americas

9 New York, New York 10036

Tel: (212) 506-3900

10 Fax: (212) 506-3950

11 JEFF E. BUTLER (pro hac admission pending)

jeff.butler@cliffordchance.com

12 CHRISTOPHER J. MORVILLO (admitted pro hac vice)

christopher.morvillo@cliffordchance.com

13 CLIFFORD CHANCE US LLP

31 West 52nd Street

14 New York, New York 10019

Tel: (212) 878-8000

15 Fax: (212) 878-8375

16 Attorneys for Defendant

MICHAEL LYNCH

18 UNITED STATES DISTRICT COURT

19 FOR THE NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

21 IN RE HP SECURITIES LITIGATION

This Document Relates To: All Actions

) **CASE NO. C-12-5980 CRB**

) **DEFENDANT MICHAEL LYNCH'S**
) **NOTICE OF MOTION AND**
) **MOTION TO DISMISS THE**
) **CONSOLIDATED COMPLAINT**

) Date: October 25, 2013

) Time: 10:00 a.m.

) Dept: 6

) Judge: Hon. Charles R. Breyer

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2

3 **PLEASE TAKE NOTICE THAT** on October 25, 2013, at 10:00 a.m. before the

4 Honorable Charles Breyer, at 450 Golden Gate Avenue, Courtroom 6, San Francisco, California,

5 Defendant Michael Lynch will and hereby does move pursuant to Federal Rule of Civil

6 Procedure Rule 12(b)(6) to dismiss the Consolidated Complaint for Violation of the Federal

7 Securities Laws, filed May 3, 2013 ("Complaint" or "CC"). Dr. Lynch bases his motion to

8 dismiss Plaintiffs' claim under Section 10(b) of the Securities Exchange Act of 1934 (the

9 "Exchange Act") and Securities and Exchange Commission Rule 10b-5 on the grounds that it

10 fails to meet the stringent standards prescribed by Federal Rule of Civil Procedure 9(b), the

11 Private Securities Litigation Reform Act of 1995 ("PSLRA") and recent Supreme Court

12 jurisprudence because Plaintiffs fail to allege (i) that Dr. Lynch made any false or misleading

13 statement; (ii) that Plaintiffs relied on any statement or conduct of Dr. Lynch; or (iii) that Dr.

14 Lynch possessed the requisite state of mind. Dr. Lynch bases his motion to dismiss Plaintiffs'

15 claim under Section 20(a) of the Exchange Act on the grounds that (i) Plaintiffs fail to state a

16 claim for a primary violation of the Exchange Act; and (ii) Plaintiffs fail to allege facts sufficient

17 to show that Dr. Lynch exercised actual power or control over any primary violator.

18 This motion is based upon this Notice of Motion, the attached Memorandum of Points

19 and Authorities, the pleadings, files and records in this case and such further evidence and oral

20 argument as may be presented by Defendant Michael Lynch prior to or at the hearing on the

21 motion.

22

23 DATED: July 2, 2013

24 STEPTOE & JOHNSON LLP

25

26

27 By: //s// Jennifer B. Bonneville

28 Jennifer B. Bonneville

 Attorneys for Defendant Michael Lynch

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	i
SUMMARY OF ARGUMENT.....	iv
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND.....	2
ARGUMENT	3
I. Plaintiffs Have Failed to State a Claim against Dr. Lynch under Section 10(b) and Rule 10b-5(b).....	4
A. The Legal Standard.....	4
B. Plaintiffs Fail to Allege that Dr. Lynch Made any False or Misleading Statement.....	6
C. Plaintiffs Are Not Entitled to Any Presumption of Reliance.....	7
D. Plaintiffs Fail to Properly Plead Scierter.....	9
II. Plaintiffs Have Failed to State a Claim Against Dr. Lynch under Section 20(a)	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Affiliated Ute Citizens of Utah v. United States</i> , 406 U.S. 128 (1972).....	iv, 7, 8
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	3
<i>Bartesch v. Cook</i> , No. 11-1173-RGA, 2013 WL 1750455 (D. Del. Apr. 23, 2013).....	7
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988).....	8
<i>Castaneda v. Saxon Mortg. Servs., Inc.</i> , 687 F. Supp. 2d 1191 (E.D. Cal. 2009).....	5
<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994).....	7
<i>City of Westland Police & Fire Ret. Sys. v. Sonic Solutions</i> , No. C 07-05111 CW, 2009 WL 942182 (N.D. Cal. Apr. 6, 2009).....	10
<i>Desai v. Deutsche Bank Secs. Ltd.</i> , 573 F.3d 931 (9th Cir. 2009)	8
<i>Dura Pharms., Inc. v. Broudo</i> , 544 U.S. 336 (2005).....	4
<i>Howard v. Everex Sys., Inc.</i> , 228 F.3d 1057 (2000).....	iv, 10, 11
<i>In re Hansen Natural Corp. Sec. Litig.</i> , 527 F. Supp. 2d 1142 (C.D. Cal. 2007)	10
<i>In re Int'l Rectifier Corp. Sec. Litig.</i> , No. CV 07-02544-JFW, 2008 WL 4555794 (C.D. Cal. May 23, 2008)	4, 8
<i>In re Yahoo! Inc. Sec. Litig.</i> , No. C 11-02732, 2012 WL 3282819 (N.D. Cal Aug. 10, 2012).....	3, 5, 9
<i>Janus Capital Group, Inc. v. First Derivative Traders</i> , 131 S. Ct. 2296 (2011).....	iv, 4, 7

1	<i>Matrixx Initiatives, Inc. v. Siracusano</i> ,	
2	131 S. Ct. 1309 (2011).....	9
3	<i>Mir v. Little Co. of Mary Hosp.</i> ,	
4	844 F.2d 646 (9th Cir. 1988)	2
5	<i>Philco Invs., Ltd. v. Martin</i> ,	
6	No. C 10-02785 CRB, 2011 WL 4595247 (N.D. Cal. Oct. 4, 2011).....	3, 9
7	<i>Reese v. BP Exploration (Alaska) Inc.</i> ,	
8	643 F.3d 681 (9th Cir. 2011)	4
9	<i>Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.</i> ,	
10	482 F.3d 372 (5th Cir. 2007)	8
11	<i>Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.</i> ,	
12	552 U.S. 148 (2008).....	iv, 4, 7, 8
13	<i>Swartz v. KPMG LLP</i> ,	
14	476 F.3d 756 (9th Cir. 2007)	5
15	<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> ,	
16	551 U.S. 308 (2007).....	iv, 5, 9
17	<i>Von Saher v Norton Simon Museum of Art at Pasadena</i> ,	
18	592 F.3d 954 (9th Cir. 2010)	2

STATUTES

19	15 U.S.C. § 78j (2006).....	4
20	15 U.S.C. §78u-4 (2006).....	5, 9
21	17 C.F.R. § 240.10b-5 (2012).....	4, 9

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

3
4

5
6
7
8
9

0
1
2
3
4
5

6
7
8
9
0

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 Defendant Michael Lynch respectfully submits this memorandum of law in support of his
4 motion to dismiss the Consolidated Complaint for Violation of the Federal Securities Laws, filed
5 May 3, 2013 ("Complaint" or "CC") (Docket No. 100).
6

7 **PRELIMINARY STATEMENT**

8 In their Complaint, Plaintiffs seek to tar Dr. Lynch, a British citizen and former CEO of
9 Autonomy Corporation plc ("Autonomy"), with accusations of financial wrongdoing that are
10 neither actionable under U.S. securities law nor, in any event, attributable to Dr. Lynch. At its
11 heart, this lawsuit involves a dispute by shareholders of Hewlett-Packard Company ("HP")
12 regarding the truthfulness of statements made by HP officers that allegedly affected the value of
13 HP shares. Critically, Dr. Lynch is not alleged to have made any of these statements. Indeed, all
14 of Dr. Lynch's supposed misdeeds are alleged to have occurred before HP even acquired
15 Autonomy in October 2011.

16 Plaintiffs' securities claims fail due to their inability to plead facts that could support a
17 finding of any wrongdoing by Dr. Lynch during his brief time at HP following the merger. Gone
18 are the days when a securities class action plaintiff could sue everyone even tangentially related
19 to a transaction. The overwhelming thrust of recent Supreme Court precedent and congressional
20 action has been to drastically limit the reach of such claims and to put plaintiffs to a stern and
21 demanding test for pleading them. The aim of this jurisprudence and legislation is precisely to
22 spare defendants the impossible task that Plaintiffs seek to impose on Dr. Lynch in this case –
23 namely, to defend his reputation and life's work in court against vague and unspecific allegations
24 of fraud.

25 Plaintiffs' claims against Dr. Lynch should not stand.

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FACTUAL BACKGROUND¹

Dr. Lynch is a British scientist and entrepreneur who founded Autonomy in Cambridge, England in 1996. (CC ¶ 15.) From its founding, Autonomy rapidly grew into the largest software company in the United Kingdom and one of the largest in Europe, with a reputation as a world-leading provider of infrastructure software for unstructured information and meaning-based technologies. (CC ¶¶ 15, 16.) Autonomy's Intelligent Data Operating Layer ("IDOL") software allows computers to analyze and understand raw information in various forms – including emails, voicemails, websites, phone conversations, and video – and to perform a host of different operations on that information to deliver relevant results to the user. (See CC ¶ 15.)

The IDOL technology is widely regarded as uniquely powerful and valuable. To this day, even HP's CEO, Meg Whitman, refers to IDOL as "almost magical technology."² Indeed, HP's website features a quote from THE GUARDIAN newspaper that states: "The success of Autonomy's business model has never been in doubt – its ability to retrieve information surpasses even Google in the complexity and variety of data it can make connections between."³

According to the Complaint, Dr. Lynch met with HP's then-CEO, Léo Apotheker, in April 2011 to discuss a possible acquisition of Autonomy by HP. (CC ¶ 31.) Dr. Lynch and Apotheker struck a deal in principle for the acquisition in July 2011, whereupon HP began its due diligence process. (CC ¶ 33.) On August 18, 2011, Autonomy and HP publicly announced that HP would acquire Autonomy for approximately \$11 billion. (CC ¶ 44.) The deal closed on October 3, 2011. (CC ¶ 72.) As part of the acquisition, Dr. Lynch joined HP as Executive Vice

¹ For the purpose of this motion to dismiss only, facts alleged in the Complaint are presumed to be true. See *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

² Katherine Rushton, *HP boss Meg Whitman admits Autonomy row hit morale*, TELEGRAPH (Apr. 10, 2013), <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/electronics/9984271/HP-boss-Meg-Whitman-admits-Autonomy-row-hit-morale.html> (Vol. 2, Tab 40). This Court can take judicial notice of this and other published statements cited in this motion. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

³ *About Autonomy*, <http://www.autonomy.com/content/Autonomy/introduction/index.en.html>.

1 President of Information Management. (CC ¶ 8.) The Complaint alleges that Dr. Lynch held
2 that position until his employment was terminated in April 2012. (CC ¶ 80.)

3 On November 20, 2012, just over a year after acquiring Autonomy, HP announced that it
4 was writing down Autonomy's value by \$8.8 billion. (CC ¶ 84.) The following week, HP
5 shareholders filed an avalanche of securities fraud lawsuits. Those cases were consolidated into
6 the instant action, and a lead plaintiff and lead counsel appointed, by order dated March 4, 2013.
7 (*See* Case No. 3:12-6003 (CRB), Docket No. 65.) The Complaint that is the subject of this
8 motion was subsequently filed on May 3, 2013.

9 The Complaint asserts claims against Dr. Lynch for violation of Section 10(b) of the
10 Securities Exchange Act of 1934 (the "Exchange Act") and Securities and Exchange
11 Commission Rule 10b-5(b) ("Rule 10b-5") and for control person liability under Section 20(a) of
12 the Exchange Act. The Complaint alleges that, between August 19, 2011 and November 20,
13 2012 (the "Class Period"), HP and certain of its executives, including Dr. Lynch, made
14 misrepresentations and omissions concerning the value of Autonomy through HP's financial
15 statements and certain other public statements. (CC ¶¶ 3, 4.) These misrepresentations and
16 omissions are alleged to have been made both prior to and following HP's acquisition of
17 Autonomy. (CC ¶¶ 7, 163-218.)

18 ARGUMENT

19 To survive a motion to dismiss, "[a] complaint must plead 'enough facts to state a claim
20 to relief that is plausible on its face.'" *Philco Invs., Ltd. v. Martin*, No. C 10-02785 CRB, 2011
21 WL 4595247, at *1 (N.D. Cal. Oct. 4, 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678
22 (2009)). Facial plausibility requires the pleading of facts upon which a court could draw a
23 "reasonable inference" of liability. *Id.* (quoting *Iqbal*, 556 U.S. at 678). Thus, dismissal is
24 appropriate where a complaint lacks either "a cognizable legal theory" or "sufficient facts
25 alleged under a cognizable legal theory." *In re Yahoo! Inc. Sec. Litig.*, No. C 11-02732, 2012
26 WL 3282819, at *6 (N.D. Cal. Aug. 10, 2012) (internal citations omitted). A recital of the
27 elements of a claim, supported by "mere conclusory statements," is insufficient to survive a
28 motion to dismiss. *Iqbal*, 556 U.S. at 678.

I.

**Plaintiffs Have Failed to State a Claim against
Dr. Lynch under Section 10(b) and Rule 10b-5(b)**

A. The Legal Standard.

Section 10(b) makes it “unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance” in contravention of SEC rules. 15 U.S.C. § 78j(b) (2006). SEC Rule 10b-5(b) provides that it is “unlawful for any person, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading” in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5(b) (2012).

Section 10(b) does not expressly create a private right of action, but the Supreme Court has recognized an implied right of action. *See Stoneridge Inv. Partners, LLC v. ScientificAtlanta, Inc.*, 552 U.S. 148, 157 (2008). Because the cause of action is judicially created, however, the Supreme Court has repeatedly “caution[ed] against its expansion.” *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011).

To state a cause of action for violation of Section 10(b) and Rule 10b-5, a plaintiff must allege “(1) a material misrepresentation (or omission), (2) made with scienter, (3) on which plaintiff relied, (4) that proximately caused (5) economic loss, (6) in connection with the purchase or sale of a security.” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 685 (9th Cir. 2011) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)).

Claims under Section 10(b) and Rule 10b-5 also must comply with the particularity requirements of Federal Rule of Civil Procedure 9(b). *See Id.* at 690. Rule 9(b)’s heightened pleading requirements are designed “to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *In re Int’l Rectifier Corp. Sec. Litig.*, No. CV 07-02544-JFW (VBKx), 2008 WL 4555794, at *8 (C.D. Cal. May 23, 2008) (internal quotation marks and citation omitted).

1 Rule 9(b) requires a plaintiff to plead “the time, place, and specific content of the false
2 representations as well as the identities of the parties to the misrepresentations.” *In re Yahoo!*,
3 2012 WL 3282819, at *6 (internal quotation marks and citations omitted). Moreover, “[w]here
4 multiple defendants are asked to respond to allegations of fraud, the complaint must inform each
5 defendant of his alleged participation in the fraud.” *Castaneda v. Saxon Mortg. Servs., Inc.*, 687
6 F. Supp. 2d 1191, 1199 (E.D. Cal. 2009) (internal citations and quotation marks omitted). “Rule
7 9(b) does not allow a complaint merely to lump multiple defendants together but require[s]
8 plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform
9 each defendant separately of the allegations surrounding his alleged participation in the fraud.”
10 *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal citation omitted).

11 In addition to Rule 9(b), Plaintiffs also must comply with the “exacting pleading
12 requirements” of the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), which
13 was enacted “[a]s a check against abusive litigation by private parties” in order to “curb
14 perceived abuses of the § 10(b) private action – nuisance filings, targeting of deep-pocket
15 defendants, vexatious discovery requests and manipulation by class action lawyers.” *Tellabs,*
16 *Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 320 (2007) (internal quotation marks and
17 citations omitted). The PSLRA requires that a complaint alleging securities fraud both
18 (i) “specify each statement alleged to have been misleading [and] the reason or reasons why the
19 statement is misleading” and (ii) “state with particularity facts giving rise to a strong inference
20 that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(1)-(2) (2006).

21 As shown below, Plaintiffs’ claim against Dr. Lynch fails to meet the stringent standards
22 prescribed by Rule 9(b), the PSLRA and recent Supreme Court jurisprudence for a Section 10(b)
23 claim. Plaintiffs’ claim fails because the Complaint fails to allege (i) that Dr. Lynch made any
24 misleading statement; (ii) that Plaintiffs relied on any statement or conduct of Dr. Lynch; or
25 (iii) that Dr. Lynch possessed the requisite state of mind.

26 ///

27 ///

28 ///

1 **B. Plaintiffs Fail to Allege that Dr. Lynch Made any False or Misleading Statement.**

2 Plaintiffs' claim fails because Plaintiffs do not allege that Dr. Lynch made any of the
3 allegedly false or misleading statements identified in the Complaint. Indeed, the 100 page
4 Complaint alleges virtually *no conduct or activity of any sort by Dr. Lynch* during his six-month
5 tenure at HP. Only four paragraphs of the Complaint concern Dr. Lynch's time at HP:

- 6 • Dr. Lynch served as HP's Executive Vice President of Information Management,
7 controlling the Information Management division and reporting directly to
8 Whitman, and was described in HP's 2011 Annual Report as one of its top 15
9 executive officers. (CC ¶¶ 45, 109.)
- 10 • He was "quietly removed" from that position in late April 2012, and Whitman
11 subsequently stated in a May 23, 2012 earnings call that he had been terminated
12 due to "disappointing" revenue, which Plaintiffs allege was "the result of HP's
13 aggressive internal efforts to unwind Autonomy's improper accounting practices."
14 (CC ¶ 45.)
- 15 • Whitman stated in a June 5, 2012, interview that "'for many entrepreneurs [*i.e.*,
16 Lynch], *processes and discipline are dirty words*,'" and that "she wanted to
17 'make sure that [Autonomy] gets integrated into the rest of HP *in a good way*.'" (CC ¶ 81 (brackets and emphases in original).)
- 18 • "By virtue of [Dr. Lynch's] high level position at HP, the fraudulent conduct HP
19 accused him of engaging in during the Class Period is imputed to HP by operation
20 of law."⁴ (CC ¶ 109.)

21
22 Taken together, these allegations amount to little more than a recitation of the dates of
23 Dr. Lynch's employment at HP, his title, and whom he reported to. For the rest, Plaintiffs rely
24 on boilerplate allegations reciting the elements of a Section 10(b) claim in which they simply
25 group Dr. Lynch with all of the other "Insider Defendants" and hold him responsible for
26 statements made before and well after he worked for HP. (See CC ¶¶ 119-23.)

27
28 ⁴ Plaintiffs never identify the alleged "fraudulent conduct HP accused him of engaging in during the Class Period." (CC ¶ 109.)

1 As the Supreme Court recently announced in *Janus Capital*, a defendant cannot be held
2 liable under Section 10(b) for a false or misleading statement that he did not make. 131 S. Ct. at
3 2302. “[T]he maker of a statement is the person or entity with ultimate authority over the
4 statement, including its content and whether and how to communicate it.” *Id.* To hold
5 otherwise, the Court explained, would impermissibly expand the reach of Section 10(b) by
6 turning aiders and abettors into primary violators in violation of the Court’s prior holding in
7 *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).
8 *Janus Capital*, 131 S. Ct. at 2302 (citing *Central Bank*, 511 U.S. 164). For that reason, the *Janus*
9 Court specifically rejected a definition of “make” that “would permit private plaintiffs to sue a
10 person who ‘provides the false or misleading information that another person then puts into the
11 statement.’” *Id.* at 2303.

12 Here, none of the alleged misrepresentations or omissions was made by, authored by, or
13 attributed to Dr. Lynch. (See CC ¶¶ 163-209.) None of HP’s financial statements was signed by
14 Dr. Lynch, nor do Plaintiffs allege that Dr. Lynch ever participated in preparing either the
15 financial statements or any of the public statements made by HP. Moreover, it is undisputed that
16 Dr. Lynch was an HP employee for only six months of the Class Period, and an officer of HP for
17 less time than that. (CC ¶¶ 109.) Dr. Lynch cannot be held liable under Section 10(b) for
18 statements made when he was not an officer of HP. See, e.g., *Bartesch v. Cook*, No. 11-1173-
19 RGA, 2013 WL 1750455, at *7 (D. Del. Apr. 23, 2013) (citing *Janus Capital*, 131 S. Ct. at
20 2302). Because Plaintiffs have not alleged any actionable statement by Dr. Lynch, their claim
21 under Section 10(b) and Rule 10b-5 must be dismissed.

22 **C. Plaintiffs Are Not Entitled to Any Presumption of Reliance.**

23 Plaintiffs’ claim also fails because they do not plead reliance. “Reliance by the plaintiff
24 upon the defendant’s deceptive acts is an essential element of the § 10(b) private cause of
25 action.” *Stoneridge*, 552 U.S. at 159. Plaintiffs attempt to satisfy this requirement by invoking
26 two rebuttable presumptions of reliance: (i) fraud-on-the-market and (ii) the presumption
27 established by the Supreme Court in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S.
28 128 (1972). (See CC ¶¶ 223-24.) Plaintiffs are not entitled to rely on either of these

1 presumptions because they fail to allege that Dr. Lynch made any false or misleading statement
2 or that Dr. Lynch had a duty to disclose.

3 The fraud-on-the-market presumption of reliance, approved by the Supreme Court in
4 *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), is available only “when the statements at issue
5 become public.” *Stoneridge*, 552 U.S. at 159. Upon publication, the “information is reflected in
6 the market price of the security,” and only then can it “be assumed that an investor who buys or
7 sells stock at the market price relies upon the statement.” *Id.* Thus, where a defendant made no
8 public statement, the presumption of reliance does not apply. *See, e.g., Desai v. Deutsche Bank*
9 *Securities Ltd.*, 573 F.3d 931, 940 (9th Cir. 2009); *Regents of Univ. of Cal. v. Credit Suisse First*
10 *Boston (USA), Inc.*, 482 F.3d 372, 397 (5th Cir. 2007) (“the fraud-on-the-market presumption
11 requires that there be a public misrepresentation upon which the market can rely”).

12 The same is true where a plaintiff alleges reliance on a deceptive act by the defendant. If
13 the alleged acts were never publicly disclosed, the market cannot have relied on them. *See*
14 *Stoneridge*, 552 U.S. at 165, 167 (noting that its holding “is consistent with the narrow
15 dimensions we must give to a right of action Congress did not authorize when it first enacted the
16 statute and did not expand when it revisited the law”).

17 As discussed above, Plaintiffs fail to allege any public statement by Dr. Lynch.
18 Moreover, they cannot invoke the fraud-on-the-market presumption merely by alleging some
19 unspecified “fraudulent conduct” that they say “HP accused [Dr. Lynch] of engaging in during
20 the Class Period.” (CC ¶ 109.) *See, e.g., In re Int’l Rectifier Corp.*, 2008 WL 4555794, at *11
21 (fraud-on-the-market presumption not available where individual defendants made no
22 misrepresentation or omission and alleged fraudulent accounting practices were not
23 communicated to the public) (citing *Stoneridge*, 552 U.S. at 158-59).

24 The *Affiliated Ute* presumption of reliance is similarly unavailable to Plaintiffs. That
25 presumption is available only where “there is an omission of a material fact by one with a duty to
26 disclose.” *Stoneridge*, 552 U.S. at 159 (citing *Affiliated Ute*, 406 U.S. at 153-54). Neither
27 Section 10(b) nor Rule 10b-5(b) creates an affirmative duty to disclose. Rather, disclosure is
28 required only when necessary “to make . . . statements [previously] made, in the light of the

1 circumstances under which they were made, not misleading.” *Matrixx Initiatives, Inc. v.*
2 *Siracusano*, 131 S. Ct. 1309, 1321-22 (2011) (citing 17 C.F.R. § 240.10b-5(b)); *see also Philco*,
3 2011 WL 4595247, at *7 n.11 (same); *In re Yahoo!*, 2012 WL 3282819, at *7 (same).

4 As discussed above, Plaintiffs do not allege that Dr. Lynch made any statements,
5 misleading or otherwise. As a result, there is no basis on which the Court could conclude that
6 Dr. Lynch had a duty to disclose that could support the *Affiliated Ute* presumption of reliance.

7 **D. Plaintiffs Fail to Properly Plead Scienter.**

8 Finally, Plaintiffs’ conclusory allegations of scienter are insufficient to support a claim
9 for securities fraud. Scienter is defined as “a mental state embracing intent to deceive,
10 manipulate, or defraud.” *Tellabs*, 551 U.S. at 319 (internal citation omitted). The PSLRA
11 requires Plaintiffs to allege “with particularity” facts “giving rise to a strong inference” of
12 scienter. 15 U.S.C. § 78u-4(b)(2). To qualify as “strong,” an inference of scienter must be
13 “cogent and at least as compelling as any opposing inference one could draw from the facts
14 alleged,” after considering the allegations of a complaint as a whole. *Tellabs*, 551 U.S. at 310.

15 Here, Plaintiffs allege no facts specific to Dr. Lynch but instead group him together with
16 all of the other defendants in one conclusory allegation:

17
18 HP and the Insider Defendants had actual knowledge of the
19 misrepresentations and omissions of material fact set forth herein,
20 or recklessly disregarded the true facts that were available to them.
21 Defendants’ misconduct was engaged in knowingly or with
22 reckless disregard for the truth, and for the purpose and effect of
concealing HP’s true financial condition from the investing public
and supporting the artificially inflated price of HP’s common
stock.

23 (CC ¶ 236.)

24 This bald and unsupported statement in the Complaint does not come close to meeting the
25 strict pleading requirements for scienter. *See Philco*, 2011 WL 4595247, at *8 (“Conclusory
26 allegations about a defendant’s state of mind, without specific facts, are not enough.”) (citing
27 15 U.S.C. § 78u-4(b)(3)). For this additional reason, Plaintiffs’ claim against Dr. Lynch under
28 Section 10(b) and Rule 10b-5 must be dismissed.

1 II.

2 **Plaintiffs Have Failed to State a Claim**
3 **Against Dr. Lynch under Section 20(a)**

4 To state a claim for control person liability under Section 20(a), a plaintiff must allege
5 (i) a primary violation of the Exchange Act; and (ii) that the defendant “exercised actual power
6 or control over the primary violator.” *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir.
7 2000). Here, even assuming that Plaintiffs could establish a primary violation by HP or some
8 other defendant, the Complaint fails to allege facts sufficient to establish the requisite control by
9 Dr. Lynch over any such primary violator.

10 The Complaint merely alleges Dr. Lynch’s title at HP (CC ¶ 109) and the following
11 boilerplate allegation of control (asserted against all of the “Insider Defendants”):

12 During the Class Period, the Insider Defendants acted as
13 controlling persons of HP within the meaning of § 20(a) of the
14 Exchange Act. By reason of their high-level positions with the
15 Company, participation in and/or awareness of the Company’s
16 operations, direct involvement in the day-to-day operations of the
17 Company, and/or intimate knowledge of the Company’s actual
18 performance, the Insider Defendants had the power to influence
19 and control and did influence and control, directly or indirectly, the
20 decision-making of the Company, including the content and
21 dissemination of the materially false and misleading statements
22 alleged herein.

23 (CC ¶ 240.) These allegations are not sufficient to state a claim for Section 20(a) liability.

24 Courts have repeatedly held that allegations of a defendant’s title, coupled with
25 boilerplate allegations consisting of “bare legal conclusions . . . devoid of any factual
26 underpinnings,” are insufficient to support a Section 20(a) claim. *City of Westland Police & Fire*
27 *Ret. Sys. v. Sonic Solutions*, No. C 07-05111 CW, 2009 WL 942182, at *11 (N.D. Cal. Apr. 6,
28 2009); *see also In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1163 (C.D. Cal.
2007) (dismissing Section 20(a) claim based on a nearly identical “boilerplate allegation” that
“[b]y virtue of their high-level positions . . . participation in and/or awareness of the Company’s
operations and/or intimate knowledge of the false financial statements . . . the Individual

1 Defendants had the power to influence and control . . . the decision making of the Company”);
2 *Howard*, 228 F.3d at 1067 (dismissing § 20(a) claim where “Plaintiff simply point[ed] to [the
3 director’s] general level of control but provide[d] no specific indication that [he] supervised or
4 had any responsibility for the preparation of the financial statements”).

5 Here, the only allegations of control are boilerplate assertions, applicable to all “Insider
6 Defendants” and not specific to Dr. Lynch. Such assertions are patently insufficient to establish
7 that Dr. Lynch exercised actual power or control over HP (or anyone else). Accordingly, the
8 Section 20(a) claim against him must be dismissed.

9 **CONCLUSION**

10 For all the foregoing reasons, Defendant Michael Lynch respectfully requests that this
11 Court dismiss the Consolidated Complaint as against him with prejudice.

12
13 DATED: July 2, 2012

14 STEPTOE & JOHNSON LLP

15
16
17 By: //s// Jennifer B. Bonneville
18 Jennifer B. Bonneville
Attorneys for Defendant Michael Lynch

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

//s// Jennifer B. Bonneville
Jennifer Bonneville